STATE OF MICHIGAN

IN THE SUPREME COURT

GREAT WOLF LODGE OF TRAVERSE CITY, LLC

Plaintiff-Appellee,

v

MICHIGAN PUBLIC SERVICE COMMISSION and CHERRYLAND ELECTRIC COOPERATIVE

Defendants-Appellants.

Supreme Court Nos. ~~139541-2 &~~ 139544-5

Court of Appeals Nos. 281398 & 281404

Ingham Circuit Court No. 06-001484-AA

MPSC Case No. U-14593

BRIEF ON APPEAL--DEFENDANT-APPELLANT CHERRYLAND ELECTRIC COOPERATIVE

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

Appellant Cherryland Electric Cooperative ("Cherryland") sought leave to appeal the Court of Appeals' July 14, 2009 Court of Appeals Opinion and Order in *Great Wolfe Lodge of Traverse City, LLC v Mich Pub Serv Comm'n*, 285 Mich App 26; 775 NW2d 597 (2009) (Docket Nos. 281398 and 281404) (Appx. 856a). This Court issued an order on April 19, 2010 granting leave to appeal three issues: "(1) whether Cherryland Electric Cooperative is entitled to provide any component of electric service to Great Wolf Lodge of Traverse City or its buildings and facilities, (2) whether the Michigan Public Service Commission must impose interest on the refund it ordered Cherryland Electric Cooperative to pay, and (3) whether the Michigan Public Service Commission must levy a fine, under MCL 460.558, on Cherryland Electric Cooperative." This Court has jurisdiction over this matter pursuant to MCR 7.301(A)(2).

Cherryland respectfully requests that this Court reverse the Court of Appeals' decision, and affirm the Commission's decisions on all counts.

STATEMENT OF QUESTIONS INVOLVED

I. IS AN ELECTRIC UTILITY THAT HAS PROVIDED ELECTRIC SERVICE TO BUILDINGS AND FACILITIES ON A PARCEL OF PROPERTY FOR SEVERAL DECADES ENTITLED TO CONTINUE SERVING THE ELECTRIC LOAD OF THE BUILDINGS AND FACILITIES LOCATED ON THAT PROPERTY WHEN THE UTILITY HAS NEVER ABANDONED ITS ELECTRICAL EQUIPMENT LOCATED ON THE PROPERTY AND HAS NEVER CONSENTED IN WRITING TO ANOTHER UTILITY PROVIDING SERVICE TO ANY BUILDINGS AND FACILITIES LOCATED ON THE PROPERTY?

The Court of Appeals said "No."

The Circuit Court said "Yes."

The Michigan Public Service Commission presumably would answer "Yes."

Cherryland Electric Cooperative answers "Yes."

Great Wolf Lodge of Traverse City, LLC presumably would answer "No."

This Court should answer "Yes."

II. IF NO STATUTE OR RULE REQUIRES THE MICHIGAN PUBLIC SERVICE COMMISSION TO INCLUDE INTEREST IN AWARDING A REFUND TO A CUSTOMER, MAY THE COMMISSION RELY ON ITS EXPERTISE AND EXERCISE SOUND JUDGMENT IN DECIDING NOT TO AWARD INTEREST?

The Court of Appeals said "No."

The Circuit Court said "No."

The Michigan Public Service Commission presumably would answer "Yes."

Cherryland Electric Cooperative answers "Yes."

Great Wolf Lodge of Traverse City, LLC presumably would answer "No."

This Court should answer "Yes."

III. WHERE A STATUTE ALLOWS THE MICHIGAN PUBLIC SERVICE COMMISSION TO IMPOSE A FINE "NOT TO EXCEED THE SUM OF 300 DOLLARS" FOR "WILLFULLY OR KNOWINGLY" FAILING OR NEGLECTING TO OBEY OR COMPLY WITH AN ORDER, MAY THE COMMISSION DETERMINE THAT NO FINE IS WARRANTED WHEN IT CONCLUDES, BASED ON ITS INDUSTRY EXPERTISE AND THE RECORD BEFORE IT, THAT THE UTILITY MISINTERPRETED A COMMISSION ORDER, BUT THAT THE MISINTERPRETATION WAS NOT "CLEARLY UNREASONABLE"?

The Court of Appeals said "No."

The Circuit Court said "No."

The Michigan Public Service Commission presumably would answer "Yes."

Cherryland Electric Cooperative answers "Yes."

Great Wolf Lodge of Traverse City, LLC presumably would answer "No."

This Court should answer "Yes."

INTRODUCTION

> While it is not supposed to be popular to speak of exclusive franchises, it should be recognized that the best service at the lowest possible price can only be obtained, certainly in connection with the industry with which we are identified, by exclusive control of a given territory being placed in the hands of one undertaking.[1]

This 1898 statement demonstrates the long-recognized reality that certainty in an electric utility's service territory reduces costs to consumers. Without some recognition that it will be allowed to continue to serve customers once it extends service to those customers, an electric utility will be reluctant to invest its time and capital extending service. Perhaps even worse, lending institutions will be reluctant to finance a utility's extension, thus driving up the price of capital. Such uncertainty can lead to significantly increased costs for the electric consumer. And the financial woes may be the least of the public's concerns if every utility has duplicative facilities running in every direction—the safety implications of having several lines running throughout the area are obvious. For these and other reasons, Michigan has a well-established policy of prohibiting customers from switching electric utilities once a utility serves facilities and buildings located on a parcel of property. Throughout this entire action, Great Wolf Lodge of Traverse City, LLC (the "Lodge") has ignored statutory, regulatory, and judicial authority and sought to extinguish this policy.

SUMMARY OF ARGUMENT

Apparently unconcerned with long-standing public policy that ensures low-cost delivery of electricity, the Lodge initiated this litigation by filing a two-count complaint with the

[1] Remarks of Samuel Insull, giving a speech titled "Public Control and Private Operation," to the National Electric Light Association (now the Edison Electric Institute), Chicago, Illinois, June 7, 1898,

Michigan Public Service Commission (the "Commission") seeking, in part, a declaration that the Lodge could accept electric distribution service from any provider of its choosing. Accordingly, the first issue in this appeal is whether Cherryland Electric Cooperative ("Cherryland") may continue service to the Lodge because it has been providing service to the buildings and facilities located on the parcel where the Lodge sits since at least 1940. Administrative Rule 1999 AC, R 460.3411 ("Rule 411"), promulgated by the Commission, provides that once a utility serves a customer, then that utility is entitled to serve the entire electric load of all customers located on a single premises. A "customer" is the buildings and facilities receiving service—not the owner of such buildings and facilities. Prior rulings from the Commission and the Court of Appeals have made clear that a utility's entitlement to serve under Rule 411 remains valid despite an interruption of electric service, a transfer of ownership of the underlying real property or buildings, or the demolition of the buildings that received electric service, so long as the utility at all times asserted its rights and fulfilled its obligations to serve. In other words, the clear policy in Michigan, based on promulgated rules, Commission orders, and Court of Appeals decisions, was to protect an electric utility's investment by preventing current or new property owners from switching electric utilities once that utility had at some point in time served buildings or facilities located on the property with electric service.

Interpreting those rules, regulations, orders, and relevant Court of Appeals precedent, the Commission held that Cherryland is entitled to provide electric service to the buildings and facilities constructed on the property now owned by the Lodge. The Circuit Court agreed. The Court of Appeals, however, ignored binding precedent, vacated the Commission's decision, and adopted a new framework for determining whether an electric utility is entitled to serve buildings and facilities on a parcel of property. Although not even an issue on appeal, the Court of

Appeals also held that where a Commission-regulated utility's customer wishes to switch to a municipal utility, Rule 411 does not protect the Commission-regulated utility. The Court of Appeals stated that, under those circumstances, MCL 124.3(2), which, according to the Court of Appeals, provides an even easier standard for allowing customers to abandon its current electric utility, must guide the Commission.

Under the Court of Appeals newly announced framework, an electric utility's entitlement to serve buildings and facilities can now be severed, even in situations where the utility at all times asserted its rights and fulfilled its obligations to serve. Not only does the Court of Appeals decision ignore the sound policy of protecting an electric utility's service territory and disregard massive investments made by utilities, it also opens the floodgates for new litigation regarding whether a customer can simply switch electric utilities—an issue that for years had been clearly decided. Every electric utilities' customer base is now in jeopardy—the utilities' investment of time and money to extend services to customers may now all be for naught, as long as a new owner of property decides it wants to receive service from a municipal utility.

In addition to seeking a declaration that it may switch electric providers as it sees fit, the Lodge also sought a refund of claimed overpayments to Cherryland, and requested that the Commission levy a fine against Cherryland. The second and third issues in this appeal, therefore, are whether the Commission properly exercised its statutorily granted authority when it decided not to fine Cherryland, and whether the Commission properly exercised its authority not to award interest.

The Lodge's complaint claimed that Cherryland was charging the Lodge an unauthorized rate. The Lodge won that claim on a summary disposition motion. In granting the Lodge relief, however, the Commission found that Cherryland's billing of the Lodge was not based on a

"clearly unreasonable" interpretation of a prior Commission order. Based on its experience and exercising its sound discretion, the Commission concluded that Cherryland must refund the difference to the Lodge, but that Cherryland's actions *did not* merit a fine. Despite its lack of standing to appeal a Commission decision regarding fines levied against another party, the Lodge sought review of the Commission's exercise of its discretion to not fine Cherryland. The Circuit Court reversed the Commission, and the Court of Appeals affirmed the reversal. In so doing, both the Circuit Court and the Court of Appeals ignored the Commission's factual findings and misinterpreted and misapplied MCL 460.558—a statute under the Commission's purview—to conclude that a fine was mandatory. Accordingly, even assuming that the Circuit Court and Court of Appeals had subject-matter jurisdiction over the issue (which they did not), the misinterpretation of MCL 460.558 was clearly erroneous.

In addition to misinterpreting MCL 460.558, the Circuit Court and Court of Appeals also disregarded the Commission's findings and found that the Commission should have ordered that Cherryland include interest in its refund to the Lodge. Despite no existing statutory duty to make such an award, and instead citing a Court of Appeals case stating that the Commission is *authorized* (not *required*) to order interest with refunds, the Circuit Court determined that the Commission erred by not ordering that Cherryland include interest in its refund to the Lodge. The Court of Appeals affirmed. Because this decision ignores the Commission's findings and usurps the Commission's expertise and discretion for that of the Courts, the decision must be reversed—there is simply no legal justification for a Court to require the Commission to order interest payments.

MATERIAL FACTS AND PROCEEDINGS

I. IN RESPONSE TO A REQUEST FOR SERVICE, IN 1940 CHERRYLAND BEGAN PROVIDING ELECTRIC SERVICE TO THE BUILDINGS AND FACILITIES LOCATED ON THE PROPERTY NOW OWNED BY THE LODGE.

The Lodge sits on a 48-acre parcel of real property in Garfield Township located at the intersection of US-31/37 (the "Property"). (Dkt. 28, Exh. I, p 6, Appx. 550a).[2] Before the Lodge bought the Property, the Property was part of an L-shaped 120-acre parcel owned by the Oleson family, who used it for agricultural purposes. *Id.* In February 1940, the Oleson family granted Cherryland a blanket easement on the Property so Cherryland could locate electric facilities over the Property and serve the Olesons' house and barn. (Dkt. 38, Exh. J, p 38, Appx. 551a; Dkt. 28, Exh. K, Appx. 553a). As the Lodge even admits, the "Oleson farmhouse had previously received electric service from Cherryland… ." (Dkt. 14, p 3, Appx. 243a).

On March 5, 2002, the Lodge purchased the Property from the Oleson family. (Dkt. 28, Exh. I, Appx. 550a). At that time, Cherryland still had an existing electrical distribution line (commonly known as a "service drop") running to a farmhouse on the Property:

> …a service drop running from one of Cherryland's distribution lines (which traversed the property) to the Oleson farmhouse had never been removed. The farm buildings would need to be razed to make room for the planned Lodge, and this service drop would need to be removed before the building could be razed…

(Dkt. 14, p 3, Appx. 243a). In anticipation of the Lodge's purchase of the Property and plan to demolish the buildings and build a water-park, the Olesons requested that Cherryland deactivate the electricity to the Oleson house and barn. Cherryland responded by asserting its rights to

[2] "Dkt." Refers to the docket number on the Commission's docket sheet located at its website: http://efile.mpsc.state.mi.us/efile/viewcase.php?casenum=14593. A copy of the Commission docket sheet is at Appx. 3a-6a.

serve. (Dkt. 14, Exh. A, Appx. 259a). Although Cherryland de-energized its lines at the Olesons' request, Cherryland's service lines *always* remained on the Property and Cherryland never abandoned its provision of electric service to the Property. (Dkt. 29, p 3, Appx. 601a).

II. THE LODGE IGNORES CHERRYLAND'S ENTITLEMENT TO SERVE AND SOLICITS BIDS FOR ELECTRIC SERVICE.

Despite Cherryland's assertion of its rights to serve the electric load to the buildings and facilities on the Property, the Lodge took control of the Property and solicited bids for electric distribution service. (Commission Order in Case No. U-13716, p 2 (July 22, 2004), Appx. 52a).[3] The Lodge then claimed to accept a bid from Traverse City Light & Power ("TCLP"). *Id.*

III. CHERRYLAND AND THE LODGE ENTER INTO A SPECIAL CUSTOMER ELECTRIC SERVICES AGREEMENT. CHERRYLAND SEEKS COMMISSION APPROVAL OF THE TARIFF PROVIDED FOR IN THAT AGREEMENT.

After Cherryland properly refused to relinquish its rights to serve the electric load of buildings and facilities on the Property, the Lodge, acting through its parent company, the Great Lakes Companies, Inc., entered into a contract with Cherryland for the provision of electric service to the Lodge. (May 30, 2002 Special Customer Electric Service Agreement, Appx. 460a). That agreement, which was initially for a term of three years and included one-year automatic renewal provisions, required the Lodge to pay Cherryland for electric service under a Large Resort Service tariff that Cherryland filed with the Commission. *Id.* at ¶ 5.1. It also provided that such a rate would only be available if the Lodge maintained at least a 1500 kW per-month load. *Id.* As required under law, the Agreement allowed the Lodge to cancel and

[3] The Lodge has before referenced that Cherryland actually submitted a bid to the Lodge. Such a submission is meaningless—Cherryland had already informed the Lodge of its right to serve, but believed that it could avoid time-consuming and costly litigation if it was selected through the bid process. Cherryland's bid in no way was a waiver of its right to serve under Rule 411.

choose an alternative electric supplier, but provided that Cherryland would always remain the Lodge's electric distribution provider. *Id.* at ¶ 6.1. The Agreement also required Cherryland to rent 100 room nights from the Lodge for a period of two years. *Id.* at ¶ 16.0. This agreement was later superseded by a March 31, 2003 electric service agreement. (March 31, 2003 Special Customer Electric Service Agreement, Appx. 475a).

As required by the agreements, Cherryland sought Commission approval of the proposed Large Resort Services tariff ("LRS Tariff"). Although the proposed LRS tariff was broad enough to apply to other customers, when Cherryland filed its application, the Lodge was the only customer seeking service under the LRS tariff. Importantly, the LRS tariff's conditions included a provision requiring member-customers to have a 1500 kW per month load to qualify for its pricing. It also included a monthly minimum bill of $27,156, and provided that the member-customer could cancel service and choose a power supplier, but only if Cherryland remained responsible for distribution and line services.

The Lodge did not intervene or participate in Cherryland's LRS tariff case. (*See* Commission Order in Case No. U-13716, p 2 (July 22, 2004), Appx. 51a). Commission Staff recommended to the Commission that it approve the proposed LRS tariff with two modifications. Cherryland agreed to the Staff's two modifications. On July 22, 2004, the Commission denied Cherryland's application. *Id.* at pp 7-8. Although the Commission found that the proposed tariff allowed Cherryland to recover its costs, it disapproved of the use of a generally available tariff based on the costs of service a single customer. The Commission concluded that Cherryland and the Lodge should have proceeded via a special contract. *Id.* In pertinent part, the Commission's Order stated:

> The Commission finds that the LRS rate promotes competition. The Commission also adopts the ALJ's finding that the LRS rate

> protects Cherryland's customers because it contributes to the margin above the incremental costs, which represents contribution towards Cherryland's fixed costs in a form that would otherwise not be available. However, the Commission is concerned that GWL is the only current Cherryland customer eligible for the tariff and that Cherryland has proposed serving GWL under a generally available tariff rather than a special contract. If the proposed tariff is approved, other large resorts may qualify for the LRS rate in the future even though there has been no showing that the incremental costs of GWL are typical of the costs that might be incurred in serving other large resorts that could become eligible for the LRS rate. The Commission finds it inappropriate to justify a generally available tariff based on the incremental costs of serving a single customer. Further, the Commission agrees with the ALJ's finding that individual contract language is inappropriate in a general tariff, which lends support to the Commission's finding that this rate should have been proposed as a special contract. Accordingly, the Commission finds that Cherryland's proposed tariff should be rejected. However, because the Commission agrees that the LRS rate is in the public interest as applied to GWL, the Commission finds that the LRS rate should be approved on a **temporary basis** to avoid any harm to GWL. **The rate shall be authorized for up to one year or until a special contract is approved.** Finally, the Commission finds that Cherryland should be directed to apply for a special contract to serve GWL. In proposing a special contract, Cherryland should keep in mind that the Commission finds that the same opportunities for customer choice should be available to GWL as are available to all special contract customers, particularly those with more than 1 megawatt of peak load. See MCL 460.10x(1).

Id. (emphasis added). The Commission gave Cherryland 30 days to file a special contract. *Id.* at pp 8, 12. The Commission also fined Cherryland $10,000 for having applied an unauthorized rate. *Id.* at 11-12.

IV. PURSUANT TO THE COMMISSION'S DIRECTIVE, CHERRYLAND FILES A SPECIAL CONTRACT, BUT THE LODGE REFUSES TO EXECUTE THE CONTRACT.

Cherryland and the Lodge were unable to reach a final agreement within the July 22, 2004 Order's 30-day deadline. In order to comply with the Commission's deadline, Cherryland filed an application with the Commission on August 20, 2004. (*See* Cherryland's Application in

Commission Case No. U-14240). Cherryland stated in its application that the Lodge was "in the process of reviewing the proposed special contract. Despite Cherryland's and [the Lodge's] good faith and diligent efforts, they were unable to execute the agreement within the 30-day time period established by the Commission's July 22, 2004 Order." *Id.* at ¶ 9.

Despite the ongoing dialogue between Cherryland and the Lodge, the Lodge responded to Cherryland's application by filing objections, which stated that the Lodge would not enter into any special contract in which Cherryland would remain the Lodge's electric distribution provider. In other words, the Lodge wanted to be able to completely sever its ties with Cherryland and no longer receive electric distribution service from Cherryland. As a result, on October 14, 2004, the Commission dismissed Cherryland's application as premature given that Cherryland and the Lodge were unable to agree upon the proposed special contract. (Commission's October 14, 2004 Order in Case No. U-14240, p 2, Appx. 65a). The Commission also stated that Cherryland and the Lodge could petition the Commission to seek resolution of any underlying dispute. *Id.*

V. BECAUSE OF THE LODGE'S FAILURE TO SATISFY THE 1500KW/MONTH THRESHOLD REQUIREMENT, CHERRYLAND BEGINS CHARGING THE LODGE UNDER ITS COMMISSION-APPROVED LARGE COMMERCIAL AND INDUSTRIAL TARIFF RATE.

Cherryland's LRS tariff, which the Lodge was subject to on only a temporary basis under the Commission's July 22, 2004 Order, required recipients to maintain greater than a 1500 kW/month load.[4] (See Appx. 51a). This also was consistent with the 2003 electric service agreements executed by the Lodge. (See Agreements, Appx. 460a and Appx. 475a).

[4] Although the Commission Staff had recommended that the Commission approve Cherryland's proposed LRS tariff with two modifications, neither of those modifications affected the 1500 kW/month load threshold requirement. Thus, the only Cherryland proposed LRS tariff

In November 2004, after the Commission dismissed Cherryland's application for approval of a special contract, and after the Lodge failed to execute a special contract with Cherryland, Cherryland began charging the Lodge under its Commission-approved Large Commercial and Industrial tariff ("LC&I tariff") because the Lodge failed to satisfy the 1500 kW/month load threshold requirement in the proposed LRS tariff. [5] The LC&I tariff was the Commission-approved tariff that met the Lodge's actual usage characteristics. Having recently been fined by the Commission for failing to charge the Lodge an approved rate, Cherryland reasonably and realistically believed it risked another fine if it continued to charge the Lodge the LRS tariff rate even though the Lodge was not meeting the requirements of the proposed LRS tariff. (Dkt. 12, Exh. G, Appx. 185a).[6]

VI. PROCEDURAL HISTORY.

A. The Lodge files a two-count complaint with the Commission seeking a refund and a declaration that the Lodge can choose any electric service provider that it desires.

The Lodge and Cherryland remained unable to reach agreement on the terms of a special contract because they disagreed on whether the Lodge had the right to leave Cherryland and choose any electric distribution utility. The Lodge then filed with the Commission a two-count complaint against Cherryland. (Dkt. 01, Appx. 67a). In Count I, the Lodge alleged that Cherryland violated MCL 460.522 and the Commission's July 22, 2004 Order by charging the Lodge under the LC&I tariff rate. *Id.* at pp 1-2. In Count II of its Complaint, the Lodge

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and rate that had even been considered by the Commission included the 1500 kW/month load threshold requirements.

[5] Cherryland informed Staff that the Lodge was using less load than required under the LRS tariff and Staff responded that Cherryland should follow the LRS tariff.

[6] The original fine assessed against Cherryland was for not charging the Lodge high enough rates.

requested that the Commission order Cherryland to execute a special contract that would allow the Lodge to elect to receive all components of its electric service, including distribution service, from any provider of its choosing. *Id.* at p 2. The Lodge further requested in Count II that the Commission order Cherryland to: (a) transfer its distribution facilities to a new provider on reasonable terms; (b) remove any unnecessary facilities; and (c) terminate the Lodge's membership in the Cooperative. *Id.*

B. Cherryland files a motion to dismiss.

On August 30, 2005, Cherryland filed a motion for summary disposition pursuant to Rule 460.17323. (Dkt. 12, Appx. 98a). With respect to Count I, Cherryland argued that it did not violate MCL 460.522 or the Commission's July 22, 2004 Order because the LC&I tariff was a Commission-approved rate and the LRS tariff did not apply to the Lodge because, under the un-refuted affidavit of Cherryland's chief executive officer, the Lodge had only met the LRS tariff's 1500 kW/month load requirement on two occasions (once in August 2003 with 1516 kW and again in July 2005 with 1530 kW). Cherryland maintained that the Commission's July 22, 2004 Order not only applied the energy charge of $0.0496/kWh, but that it necessarily included the other LRS tariff provisions, including the 1500 kW/month load requirement.

Concerning Count II, Cherryland argued that the Lodge's claim of a right to the unfettered choice of and electric distribution provider should be rejected on at least five grounds, including the following:

> (1) Michigan statutory law does not allow a customer to receive electric distribution and transmission services from an alternative electric supplier. Michigan law only provides choice with regard to generation services. Likewise, the Commission-approved customer choice programs, including Cherryland's program, do not allow a customer to receive distribution and transmission services from an alternative electric supplier. Commission-approved programs only provide choice with regard to generation services;

(2) Never before has the Commission approved a special contract that allows a customer to choose alternative providers of distribution and transmission services;

(3) Rule 411(11) entitles Cherryland to serve the entire Property on which the Lodge is located;

(4) Rule 411(2) entitles Cherryland to serve the Property on which the Lodge is located and also the Lodge because both qualify as an "existing" Cherryland customer; and

(5) Michigan statutory law prohibits a municipal utility such as TCLP from serving an existing Cherryland customer unless Cherryland consents in writing. (MCL 124.3(2)).

Id. at 10-17. Commission Staff supported Cherryland's Motion for Summary Disposition as to Counts I and II.

1. After oral argument on the motions to dismiss, the Commission Administrative Law Judge issues a proposal for decision finding in favor of the Lodge on Count I and finding for Cherryland on Count II.

On September 8, 2005, Cherryland, Staff, and the Lodge argued their motions for summary disposition before the Commission Administrative Law Judge ("ALJ"). After the hearing and after multiple briefing opportunities, the ALJ issued a written ruling on October 24, 2005, which ruled in favor of the Lodge on Count I and in favor of Cherryland on Count II. (Dkt. 24, pp 8-9, Appx. 451a-452a). The ALJ also ordered the parties to file a stipulation regarding the difference between what the Lodge had been charged under the LC&I tariff and what the Lodge would have paid if the LRS rate had been applied. *Id.* at 8. On November 7, 2005, the Lodge and Cherryland cross-appealed the ALJ's ruling.

On February 22, 2006, after yet another opportunity for briefing, the ALJ issued his Proposal for Decision. (Dkt. 43, Appx. 623a). In his Proposal for Decision, the ALJ recommended that the Commission issue a final decision granting summary disposition in favor of Cherryland on Count II and in favor of the Lodge on Count I. *Id.* at p 14. Cherryland, Staff,

and the Lodge filed numerous briefs with the Commission in which the parties challenged the ALJ's Proposal for Decision, including the filing of exceptions and replies to exceptions on March 15, 2006 and March 29, 2006, respectively.

2. The Commission grants summary disposition in the Lodge's favor on Count I and summary disposition in Cherryland's favor on Count II.

In its May 25, 2006 Opinion and Order, the Commission found that: (1) summary disposition in favor of the Lodge on Count I was appropriate because Cherryland should have charged the Lodge at the LRS rate (rather than the LC&I rate) from July 22, 2004 until July 21, 2005; (2) Cherryland's billing error resulted in an over-billing of $72,550.16; (3) Cherryland must refund the over-billed $72,550.16 to the Lodge; (4) because Cherryland's actions resulted from a reasonable misinterpretation of a Commission order, Cherryland did not willfully and knowingly violate a Commission order, and would not be fined or required to pay the Lodge interest on top of the $72,550.16 refund payment; and, (5) Count II of the Complaint must be dismissed because Cherryland is the proper provider of electric service to the Lodge. (Dkt. 51, pp 15-17, Appx. 653-655a).

3. The Lodge files an appeal—the Circuit Court affirms the Commission's decision that the Lodge cannot freely switch electric distribution providers, and partially reverses the Commission's decision regarding Count I, finding that the Commission must levy fines and award interest.

The Lodge filed an appeal under MCL 426.26 and MCR 7.204.[7] The Lodge's appeal, in pertinent part, sought a reversal of the Commission's rulings that Cherryland was entitled to serve the Lodge and that Cherryland would not be fined.

[7] The Lodge originally filed a claim of appeal in the Court of Appeals on September 20, 2006, but the Clerk of the Court of Appeals directed the Lodge to file its appeal in the Ingham County Circuit Court.

On October 2, 2007, the Ingham County Circuit Court issued an Opinion and Order that, in pertinent part, affirmed the Commission with regard to Cherryland's right to serve the Lodge and reversed the Commission with respect to fines. (*See* COA 1 Dkt. 2, Appx. 831a).[8]

4. **Both the Lodge and the Commission petition for and are granted leave to appeal with the Court of Appeals. All parties brief the appeal and the Court of Appeals issues an order vacating in part, reversing in part, and affirming in part the Circuit Court decision and remands the case to the Commission for further proceedings.**

The Lodge sought and was granted leave to appeal the Circuit Court's decision regarding Cherryland's entitlement to serve the Lodge. (COA 1 Dkt. 1 and 16, Appx. 793a). The Commission sought and was granted leave to appeal regarding the Circuit Court's decision regarding fines and interest. (COA 2 Dkt. 1 and 16).[9]

On July 14, 2009, the Court of Appeals issued an opinion and order that, among other things: vacated the Commission's decision regarding Cherryland's right to serve the Lodge; remanded to the Commission for further proceedings to develop a factual record and determine whether, when the Lodge purchased the Property in 2002, there was an existing customer for Rule 411 purposes and whether there was a customer already receiving services for purposes of MCL 124.32; and affirmed the Circuit Court's decision reversing the Commission's decisions holding that Cherryland should not be fined. See generally, *Great Wolf Lodge v Pub Service Comm*, 285 Mich App 26; 775 NW2d 597 (2009).

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[8] "COA 1 Dkt." refers to the Court of Appeals docket sheet in the appeal filed by the Lodge, which is available online at: http://coa.courts.mi.gov/resources/asp/viewdocket.asp?casenumber=281398&inqtype=public&yr=0&yr=0. A copy of the Court of Appeals docket sheet is at Appx. 7a-10a.

[9] "COA 2 Dkt." refers to the Court of Appeals docket sheet in the appeal filed by the Commission, which is available online at: http://coa.courts.mi.gov/resources/asp/viewdocket.asp?casenumber=281404&inqtype=public&yr=0&yr=0. A copy of the Court of Appeals docket sheet is at Appx. 15a-19a.

5. The Commission and Cherryland seek leave to this Court.

Both the Commission and Cherryland sought leave to appeal to this Court. On April 9, 2010, this Court granted leave, and directed the parties to brief the following issues:

> (1) whether Cherryland Electric Cooperative is entitled to provide any component of electric service to Great Wolf Lodge of Traverse City or its buildings and facilities, (2) whether the Michigan Public Service Commission must impose interest on the refund it ordered Cherryland Electric Cooperative to pay, and (3) whether the Michigan Public Service Commission must levy a fine, under MCL 460.558, on Cherryland Electric Cooperative.

(Supreme Court Order, April 9, 2010, Appx. 911a).

LAW AND ARGUMENT

I. STANDARD OF REVIEW.

This appeal involves a Court of Appeals decision that reversed a Commission order. Specifically, this case addresses whether the Commission properly interpreted and applied its own prior order (the prior order addressing the rate Cherryland could charge the Lodge), a rule promulgated by the Commission (Rule 411), and a statute conferring the Commission with authority to fine utilities (MCL 460.558). This case also addresses whether appellate courts should replace the Commission's factual findings with the courts' own conclusions, despite the Commission's experience and expertise in the utility industry.

In order to overturn a Commission order, the burden of proof is on the party aggrieved by the order to "show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." *In re MCI Telecommunications Complaint*, 460 Mich 396, 427; 596 NW2d 164 (1999), citing MCL 462.26(8). In order to overturn a Commission order on the basis that it is unlawful, "there must be a showing that the commission failed to follow some mandatory provision of the statute or was guilty of an abuse of discretion in the exercise of its judgment." 460 Mich at 427, citing *Giaras v Public Service Comm*, 301

Mich 262, 269; 3 NW2d 268 (1942). To prove a Commission order unreasonable, a party must show that the order is unsupported by the evidence. *City of Marshall v Consumers Power Co (on remand)*, 206 Mich App 666, 676; 523 NW2d 483 (1994), *lv den*, 449 Mich 861; 535 NW2d 793 (1995), citing *Associated Truck Lines, Inc v Public Service Comm*, 377 Mich 259; 140 NW2d 515 (1966).

Michigan Courts accord "substantial deference to the [Commission's] interpretations of its own orders," and "ordinarily will uphold the [Commission's] interpretations as long as they are supported by the record or otherwise reasonable." *Ameritech Mich v Pub Service Comm*, 240 Mich App 292, 303; 612 NW2d 826, citing *Abate v Pub Service Comm*, 219 Mich App 653, 661-662; 557 NW2d 918 (1996). In addition, the Commission's interpretation of a statue or rule that the Commission is charted with interpreting and administering is "entitled to respectful consideration and ought not to be overruled without cogent reasons." *In re Rovas*, 482 Mich 90, 108; 754 NW2d 259 (2008), citing *Boyer-Campbell v Fry*, 271 Mich 282, 296-97; 260 NW 165 (1935). The Commission's interpretation of statutes and rules is particularly important where, as here, the provisions involved are "obscure." *Rovas,* 482 Mich at 108 ("the agency's interpretation can be particularly helpful for 'doubtful or obscure' provisions.").

The standards articulated by Michigan courts provide that a reviewing court give "substantial deference" to the Commission's determinations regarding its prior orders. The standards also require that a court give "respectful consideration" of the Commission's interpretation of Rule 411 and MCL 460.558—the Court should look to the language of Rule 411 and MCL 460.558, examine how the Commission's order interpreted those statutes, and if that interpretation does not conflict with the intent as expressed in the rule and statute's language,

affirm the Commission's order. The Court of Appeals failed to follow this standard—this Court should reverse the Court of Appeals decision.

II. CHERRYLAND IS ENTITLED TO SERVE THE LODGE'S ENTIRE ELECTRIC LOAD BECAUSE IT HAS BEEN PROVIDING ELECTRIC SERVICE TO THE BUILDINGS AND FACILITIES LOCATED ON THE PROPERTY OWNED BY THE LODGE FOR OVER 50 YEARS AND HAS NEVER ABANDONED ITS RIGHT TO SERVE.

In Count II of its Complaint, the Lodge requested that the Commission approve a special contract that allowed the Lodge "full choice of electric providers... ." (Dkt. 01, ¶ 45, Appx. 75a). It also requested that the Commission declare that the Lodge "may elect to receive all components of electric service from any provider of its choosing." *Id.* at p 10 (emphasis added). Interpreting its own rules and prior orders, the Commission dismissed Count II because, under Rule 411(11), the Commission determined that Cherryland was entitled to serve the Lodge because "once a utility has extended service to a customer, the utility then has the right to serve the entire premises... .". (Dkt. 51, p 16, Appx. 654a). Because Cherryland had "provided service to a farmhouse located on the [Lodge's] premises for many years before [the Lodge] purchased the property," Cherryland had the right to serve the Lodge's entire electric load. *Id.* The Circuit Court properly upheld the Commission's decision in this regard, noting that "[t]here is no dispute that Cherryland was the first utility serving the farm prior to [the Lodge's] acquisition of the property. Therefore, Cherryland was entitled to serve the entire electric load on the premises." (COA 1 Dkt. 2, p 10, Appx. 840a).

The Court of Appeals, however, failed to give "respectful consideration" to the Commission's decision, *Rovas, supra*, and instead reversed the Commission. The Court of Appeals provided no "cogent" reasons for so doing. *Rovas, supra.* Instead, it ignored Rule 411's plain and unambiguous language, ignored the Commission's interpretation of that language, ignored prior Court of Appeals precedent, and created a new (unworkable and

irrelevant) test for determining whether an "existing customer" is present for purposes of Rule 411. The Court of Appeals also unnecessarily went beyond the issues raised in the Lodge's complaint and interpreted MCL 124.3 in a way that defeats the protections afforded to utilities under Rule 411. For those reasons, the Court of Appeals must be reversed.

A. Rule 411 protects electric utilities and minimizes uneconomical duplication of electric services by preventing customers from switching utilities and entitling utilities to serve a customer's entire electric load on a premises.

A brief explanation of Rule 411 provides the proper context for this appeal. Rule 411, entitled "Extension of electric service in areas served by 2 or more utilities," protects utilities that have extended their facilities to serve customers:

> (1) As used in this rule:
>
> (a) "Customer" means the buildings and facilities served rather than the individual, association, partnership, or corporation taking service.
>
> * * *
>
> (2) Existing customers shall not transfer from one utility to another.
>
> * * *
>
> (11) The first utility serving a customer pursuant to these rules **is entitled to serve the entire electric load on the premises of that customer** even if another utility is closer to a portion of the customer's load.

R. 460.3411(1), (2), and (11) (emphasis added). As the above language makes clear, once an electric utility is serving a customer, that customer cannot switch utilities. Nor may that customer have another utility serve a portion of an electric load located on the same premises as other buildings and facilities receiving service. This protection eliminates situations where a

customer could simply switch utilities and require the duplication of utility lines, facilities, and related construction.

Rule 411's origins are rooted in several disputes between electric cooperatives and privately owned electric companies. Seeking to minimize the uneconomical duplication of electric services, the Commission in 1966 adopted Rule 411's predecessor; "Rules Governing the Extension of Single-Phase Electric Service in Areas Served by Two or More Utilities." *See* Case No. U-2291, *In the matter of the adoption of rules governing the extension of single phase electric service in areas served by two or more utilities*, (March 24, 1966). Similar to Rule 411, these initial rules prohibited existing customers from transferring from one utility to another and allowed the first utility serving a customer to serve the entire electric load on the premises of that customer, even if another utility was closer. Later iterations of similar rules kept the same philosophy. *See* Case No. U-6400, *In the matter, on the Commission's own motion, of the Revision of Order No. 1692, Regulations Governing Services Supplied by Electric Utilities*, (January 22, 1980).

B. Rule 411's plain language entitles Cherryland to serve the Lodge's entire electric load, because Cherryland served facilities and buildings on the Lodge's premises.

Michigan's appellate courts consistently hold that statutory construction principles are applicable when construing administrative rules. See *Reiss v Pepsi Cola Metro Bottling Co, Inc*, 249 Mich App 631, 637; 643 NW2d 271 (2002) (Courts apply principles of statutory construction in construing administrative rules); *Detroit Base Coalition for the Human Rights of the Handicapped v Dep't of Social Services*, 431 Mich 172, 185; 428 NW2d 335 (1998) (same). And the hallmark of statutory construction is to give effect to the Legislature's (in this case the Commission's) intent. *Apsey v Memorial Hosp*, 477 Mich 120, 127; 730 NW2d 695 (2007); *Little Caesar Enterprises, Inc v Dep't of Treasury*, 226 Mich App 624, 629; 575 NW2d 562

(1998). Obviously, the most powerful indicator of that intent is a regulation's plain and unambiguous language.

Subsection (11) of Rule 411 unambiguously provides that the first utility serving a customer under the Commission's rules is "entitled to serve the entire electric load on the premises of that customer." R 460.3411(11). In order to determine whether Cherryland is entitled to serve the Lodge, then, it simply is necessary to determine whether Cherryland served a "customer" on the Lodge's premises. If it did, Cherryland is entitled to serve the entire electric load on that "customer's" premises. Such is the case in this appeal.

1. In 1940, Cherryland began serving buildings and facilities sitting on the Property.

A "customer" under Rule 411 "means the buildings and facilities served rather than the individual, association, partnership, or corporation taking service." 460.3411(2). There is no dispute that Cherryland provided electric service to the Olesons' buildings and facilities starting when Cherryland received a request for service from the Olesons in the 1940s. (Dkt. 28, Exh. J, p 38, Appx. 552a; Dkt. 28, Exh. K, p 10, Appx. 554a). The evidence presented to the Commission demonstrated that the Olesons granted Cherryland a blanket easement on the Property in 1940 so that Cherryland could locate electric facilities over the Property and serve the Olesons' house and barn. (Dkt. 28, Exh. J, p 38, Appx. 552a; Dkt. 28, Exh. K, p 10, Appx. 554a). Indeed, the Lodge even admits that the "vacant Oleson farmhouse had previously received electric service from Cherryland… ." (Dkt. 14, p 3, Appx. 243a). As a result, it is clear that, long before the Lodge purchased the Property, Cherryland served the electric load of the "buildings and facilities" located on the Property. In other words, a "customer" under Rule 411 began receiving service from Cherryland in 1940.

2. Because Cherryland was the first utility serving a customer on the Property, it is entitled to serve the entire electric load of any buildings or facilities that are ever located on the Property.

The fact that Cherryland once served facilities and buildings located on the Property leads to the undeniable conclusion that it is entitled to serve the Lodge's entire electric load. Rule 411(11)'s plain and unambiguous language provides that the first electric utility serving a customer "is entitled to serve the entire electric load on the premises of that customer." R. 460.3411(11). Here, Cherryland was serving a "customer" way back in 1940. Under Rule 411(11)'s plain language, Cherryland was "**entitled**" to serve the entire electric load on the premises of that barn and facilities. The Lodge's resort sits on that premises. Thus, Cherryland is "**entitled**" to serve the Lodge's entire electric load. This should be the end of the analysis, because the application of the facts in this case to Rule 411's plain language creates a clear result—Cherryland served a building on the Property before any other utility, so it is entitled to serve the entire electric load of any buildings or facilities located on the Property.

3. When the Lodge requested service and purchased the Property, Cherryland's electric facilities remained on the Property and Cherryland was ready and willing to serve. The deactivation of service, the change of ownership, or the destruction of buildings is irrelevant. Such actions do not sever the utility-customer relationship.

In an attempt to diminish the fact that Cherryland served buildings and facilities on the Property for over 60 years, the Lodge has maintained throughout this litigation that Cherryland's electric service line was abandoned. It has also consistently maintained that the change in ownership from the Olesons to the Lodge conferred upon the Lodge the ability to choose its electric provider. These arguments simply do not match up with the facts, and they fail as a matter of law because Cherryland's entitlement to serve an entire parcel of property under Rule

411 is not negated by a service interruption, the destruction of buildings receiving service, or a change in ownership of the parcel of property.

Initially, it is important to note that the Lodge actually requested service in 2001, while the buildings once served by Cherryland remained.[10] (While the Olesons' house and barn were standing, Cherryland's distribution line remained attached.) Furthermore, even after the buildings and facilities once served by Cherryland were demolished, Cherryland still had its electric facilities on the Property when the Lodge bought it in 2002. In fact, the Lodge even concedes that "a service drop running from one of Cherryland's distribution lines (which traversed the property) to the Oleson farmhouse had never been removed." (Dkt. 14, p 3, Appx. 243a). Cherryland never removed the lines. Regardless, it is irrelevant whether the service line had been deactivated for a few years, whether the buildings once served were demolished, or whether the Lodge was a new owner of the property.

In 2003, the Court of Appeals plainly applied Rule 411's language and recognized that the first utility to provide electric service is entitled under Rule 411 to continue to serve the entire electric load on the property where the facilities are located. The Court recognized that a change in ownership of the property, a change in use of the property, or even a discontinuance of service does not sever the first utility's entitlement to serve:

> The fact that electric service to two of the parcels was discontinued for a period is of no consequence under the administrative rules [Rule 411]. Consumers continued to maintain three-phase energized facilities on the southern edge of the parcels and the electric service was discontinued at the request of the property owners, not because of any action by Consumers. The evidence is

[10] "[T]he appropriate time to determine whether a utility has the right or obligation to serve is the time the utility receives the request for service." Case No. U-11622 *In the matter of the notice of Alpena Power Company of the extension of facilities to serve the Hillman Community School District's new secondary school building sight*, p 13 (September 28, 1998).

> clear that at no time did Consumers ever waive its right to continue service the customers on the property and it never abandoned the facilities because the facilities remained and Consumers was prepared to provide electric service.

In re Complaint of Consumers Energy Co, 255 Mich App 496, 502-03; 660 NW2d 785 (2003) (footnote omitted). This reasoning makes sense—if customers could unilaterally destroy a utility's entitlement to serve merely by selling property or requesting a disruption in service, the entire purpose behind Rule 411 would vanish—customers could easily get around Rule 411(11), thus creating the potential for duplication of service and all of the financial and safety issues that come with it. The reasoning also comports with Rule 411(11)'s plain and unambiguous language. Rule 411(11) simply provides that the first utility serving a building or facility is entitled to serve the entire electric load on the premises of that building or facility. Nothing in Rule 411(11) addresses the need to continue service for a specific period. Simply stated, unless the electric utility takes action to waive its rights by somehow abandoning its entitlement, it has the right to serve the entire electric load.

The *Consumers Energy* decision—which properly interpreted Rule 411(11)'s entitlement to the first-serving utility—recognized that a customer cannot discontinue electric service and switch utilities. It is instead the utility's entitlement to serve, and only the utility may waive that entitlement. In addition to Rule 411(11)'s plain language, then, the *Consumers Energy* decision also leads to the undeniable conclusion that Cherryland is entitled to serve the Lodge's entire load because: (1) Cherryland once served buildings and facilities on the property; (2) Cherryland did not relinquish its rights to do so.

C. The Court of Appeals improperly went beyond Rule 411(11). The Court's analysis ignores Rule 411(11)'s plain language and violates the principals of stare decisis. Regardless, even under the Court of Appeal's reasoning, Cherryland is entitled to serve the Lodge's electric load, if the Court of Appeals' reasoning is properly applied to the fact of this case.

Instead of analyzing Rule 411(11)'s plain and unambiguous language, the Court of Appeals concluded that it was required to analyze "whether [the Lodge] came to this situation as a new customer, thus entitled to choose from any available electricity provider." *Great Wolf*, 285 Mich App at 38. Casting aside Rule 411(11)'s plain language, the Court divided the analysis into two questions: (1) whether the Lodge could accept service from another Commission-regulated utility; or, (2) whether the Lodge could accept service from a municipal electric utility. Both analyses are irrelevant and flawed.

1. The Court of Appeals' decision violated stare decisis and ignored Rule 411(11)'s plain language, which entitles Cherryland to serve the Lodge's entire electric load. Regardless, Cherryland is entitled to serve the Lodge's electric load even under the Court of Appeal's flawed analysis.

In addressing whether the Lodge could receive electric service from another Commission-regulated utility, the Court first cast aside Rule 411(11) by concluding that the Rule merely concerns itself with "extensions of service on premises already being served, and guards against any single premises being served by multiple utilities." *Great Wolf, supra* at 36. It then found that the relevant question was whether the Lodge "stepped into the shoes of an existing customer of Cherryland" for purposes of Rule 411(2), which prevents "existing customers" from switching utilities. *Id.* Reaching this step in the analysis required the Court of Appeals ignore its prior published and binding precedent, as well as Rule 411's plain language.

"A published opinion of the Court of Appeals has precedential effect under the rule of stare decisis." MCR 7.215(C)(2). As a result, "[a] Court of Appeals opinion published after

November 1, 1990, is **binding precedent not only on the lower courts, but on subsequent panels of the Court of Appeals.**" *Catalina Marketing Sales Corp v Dept of Treas*, 470 Mich 13, 23; 678 NW2d 619 (2004) (emphasis added). As noted herein, in *Consumers Energy*, the Court of Appeals, *in a published opinion*, confirmed that the first utility to provide electric service to facilities on a premises is entitled under Rule 411 to continue to serve the entire electric load to the property where the facilities are located. *Consumers Energy,* 255 Mich App at 500-03. This is true even if a change in ownership in the property, a change in use of the property, or even a discontinuance of service occurs. *Id.*

The Court of Appeals' decision in this case ignored the *Consumers Energy* holding, and instead found it is possible that "discontinuation in service, and demolition of buildings, coming about for reasons other than direct furtherance of a plan to change ownership or land uses, can indeed extinguish an existing customer." *Great Wolf, supra* at 40. The Court of Appeals then declared a new test for determining whether a building or facility constitutes an "existing customer":

> If, the changes in buildings and facilities and interruption of service came about in reasonable proximity to and for the purpose of a change in ownership and plan for the site, then...those changes and that interruption did not create a new customer. If, however, the previous owner held on to the site for a significant period after all land uses requiring electricity had been abandoned, requested that electric service be terminated, and demolished buildings or removed facilities, or at least allowed them to stand without electricity, for reasons other than anticipation of an immediate change of ownership or land use, then those actions should be deemed to have extinguished the previously existing customer or customers on the site, thus severing the utility-customer relationship.

Id. Setting aside for a moment the colossal problems, the giant increase in litigation, and the increased costs such a test will cause for electric utilities and their customers, the Court of Appeal's analysis is flawed because this holding ignores and contradicts the holding from

Consumers Energy. As a contradictory holding to a published Court of Appeals decision, it violates the rules of stare decisis and must be overturned.

In an effort to avoid the obvious conflict between the *Consumers Energy* decision and the decision the Court of Appeals reached in this case, the Court of Appeals tried to narrow the holding of *Consumers Energy*. But this attempt to narrow and distinguish the *Consumers Energy* holding must fail, because it improperly ignores Rule 411(11)'s plain language. The Court of Appeals attempted to distinguish the *Consumers Energy* binding precedent by stating that the *Consumers Energy* case left open the idea that service disconnect and demolition of buildings "coming about for reasons other than direct furtherance of a plan to change ownership or land uses, can indeed extinguish an existing customer." *Id.* This interpretation is invalid because it ignores Rule 411(11)'s plain language, which does not speak to an "existing" relationship.

A court must avoid construing a statute in a manner that renders nugatory or surplusage any part of the statute (or in this case, a rule). *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). In addition, a court must give effect to every word, phrase, and clause in the statute (or in this case, a rule). *People v Hill*, 269 Mich App 505, 515; 715 NW2d 301 (2006). As explained *infra*, Rule 411(11) simply provides that once an electric utility serves a building or facility, the utility is entitled to serve the entire load on the premises where that building or facility is located. The *Consumers Energy* decision conformed to this language by making clear that discontinuing service or bulldozing buildings did not take away a utility's entitlement to serve. But the Court of Appeals new test renders Rule 411(11)'s language nugatory and meaningless, which a court is prohibited from doing. *Koontz, supra*. The Court of Appeal's interpretation allows the customer to unilaterally vanquish the first-serving utility's

entitlement. By allowing property owners to extinguish utility service rights, the Court of Appeals not only rendered certain words nugatory, it also read new words into Rule 411(11).

Under the Court of Appeals' reasoning, Rule 411(11) would now read "The first utility serving a customer pursuant to these rules is entitled to serve the entire electric load on the premises of that customer, [unless a property owner requests that service to a building or facility be disconnected for reasons other than anticipation of an immediate change of ownership or land use.]" Obviously, Rule 411(11) does not contain such language—it does not address the issue of whether a land owner can discontinue service—it simply states that the first serving utility is entitled to serve all buildings and facilities located on the premises of the first building or facility served. Thus, the Court of Appeals' decision violated the rules of statutory construction by adding words to the Rule and rendering other words meaningless. For that reason alone, the Court of Appeals decision must be overturned.

Looking beyond the stare decisis and statutory construction problems present in the Court of Appeal's decision, however, even accepting the Court of Appeals characterization of *Consumers Energy* as valid does not support overturning the Commission and the Circuit Court's decision to dismiss Count II of the Lodge's complaint. It is undisputed that the customer requested the removal of Cherryland's service drop and demolished the building where the service drop was located for the specific purpose of changing ownership and land uses. (Dkt. 14, p 3, Appx. 243a). Thus, applying the Court of Appeals' characterization of the *Consumers Energy* holding to the facts in this case establishes that the discontinuation in service in this instance did not extinguish Cherryland's entitlement to serve the entire electric load. Consequently, the Court of Appeals' failure to affirm the Commission's decision that Cherryland was entitled to serve the Lodge's electric load not only contradicts the *Consumers Energy* case, it

also contradicts the Court of Appeals' own newly-announced test. This means that the Court of Appeals' decision to reverse the Commission's decision must be overturned.

2. The presence of a municipal utility does not change Rule 411(11)'s plain language, which grants Cherryland the right to serve the Lodge's electric load. The Court of Appeals' analysis of MCL 124.3 was an improper advisory opinion that ignores Rule 411's language, defies logic, completely abrogates the policy reasons behind Rule 411, and, perhaps most importantly, ignores MCL 124.3's plain language.

The Court of Appeals also went on to conclude that the Rule 411 did not apply "where the competing entity is a municipal service not regulated by the [Commission]," and instead concluded that MCL 124.3, which addresses municipal utility extensions of service, governed whether the Lodge could switch from Cherryland to a municipal utility. *Great Wolf, supra* at 36. This analysis is flawed, because it does not matter if Rule 411(11) applies to a municipal electric provider. As has been discussed herein, under Rule 411(11), the first utility to provide electric service to facilities on a parcel of property enjoys an entitlement to continue to serve the entire electric load on the property where the buildings and facilities are located. Cherryland was the first utility to provide service to the buildings and facilities on the Property, so Cherryland is entitled to serve the entire electric load for the buildings and facilities located on the Property. Even assuming that the Court of Appeals was correct that Rule 411 does not apply to municipal electric providers, a municipal electric provider cannot eradicate a utility's entitlement to serve under Rule 411(11). Municipal utilities are prohibited from so doing by clear statutory language.

MCL 124.3, the statute cited by the Lodge throughout this litigation, and then relied upon by the Court of Appeals, prevents a municipal utility from serving customers already receiving service from another utility, unless the serving utility consents in writing:

> A municipal corporation shall not render electric delivery service for heat, power, or light to customers outside its corporate limits already receiving the service from another utility unless the serving

utility consents in writing,

MCL 124.3(2). Based on this language, the Court of Appeals concluded that a utility's entitlement to serve may more easily become extinguished where the customer wishes to switch to a non-Commission regulated utility than under Rule 411 where the customer wishes to switch to a Commission-regulated utility. Amazingly, the Court of Appeals relied upon a Circuit Court opinion in *Cherryland Electric Coop v Traverse City Light & Power*, Case No. 01-21871-CZ ("*Gordon Food Service*," Appx. 28a), to support its holding. The Court of Appeals' casting aside of Rule 411 and the *Consumers Energy* decision and the reliance upon *Gordon Food Service* is faulty for a plethora of reasons.

First, the Court of Appeals' decision to vacate the Commission order based on the Court of Appeals' determination that MCL 124.3 governs whether the Lodge can switch its electric service to a municipal utility was an improper advisory opinion. The Court of Appeals should not issue advisory opinions. *See Rozankovich v Kalamazoo Spring Corp,* 44 Mich App 426, 428; 205 NW2d 311 (1973). Yet that is exactly what the Court did in this instance. Count II of the Lodge's complaint sought a declaration that the Lodge was not an existing customer of Cherryland and that the Lodge was free to contract with any service provider of its choosing. Importantly, the Lodge did not seek a determination of whether the Lodge could contract with TCLP in particular, or municipal service providers in general. Ignoring these facts, the Court of Appeals, in remanding the case to the Commission, advised the Commission that its "factfinding mission on remand should include determining whether a 'customer' was 'already receiving service' when [the Lodge] acquired the property. In making this determination, the [Commission] is to bear in mind that, to the extent [the Lodge] wishes to do business with TCL&P, the property authority is MCL 124.3, not Rule 411." *Great Wolf Lodge*, 285 Mich App at 45. But the Court of Appeals should not have attempted to determine whether the Lodge

could contract for electric service with a municipal utility—it was not part of the relief sought, and it was not part of the basis for the Commission's dismissal of Count II. It was, therefore, improper for the Court of Appeals to make such a determination.

Even assuming resolution of the Lodge's appeal of the Commission's decision required an analysis of MCL 124.3, a plain reading of that statute supports *affirming* the Commission's decision. As explained, MCL 124.3(2) prohibits a municipal utility from delivering electric service to a customer already receiving service from another utility. MCL 124.3(2). As the evidentiary record in this case has made clear, Cherryland provided service to the buildings and facilities on the Property since the 1940s. Cherryland maintained a service drop on the Property at all times and never abandoned its entitlement to serve the buildings and facilities on the Property. Thus, the buildings and facilities receiving service on the Property constituted a "customer." Furthermore, there is no question that Cherryland, at the time of the Lodge's complaint (indeed, to this very day) was providing the Lodge with electric service.

It is undisputed that after the Lodge purchased the Property, the Lodge entered into at least two Electric Service Agreements with Cherryland for Cherryland to serve the Property's electric load. The Lodge consistently throughout this litigation has attempted to escape this conclusion by repeatedly arguing that the Electric Service Agreements were the result of duress. The Lodge advanced these arguments at both the Commission and the Circuit Court, yet neither the Commission decision nor the Circuit Court order contain a finding of duress or any other basis for finding the Electric Service Agreements between Cherryland and the Lodge invalid or unenforceable.[11] This is likely because the Lodge's duress claims are extremely specious—the

[11] The Lodge relies heavily on remarks made by the Administrative Law Judge in his Proposal for Decision. But an Administrative Law Judge's proposal for decision is irrelevant to a reviewing court's decision to affirm or reverse an agency's final decision. *Dignan v Michigan*

Lodge is a sophisticated corporation with sophisticated legal counsel. The Electric Service Agreements, which included provisions requiring Cherryland to rent 100 nights of hotel rooms for 2 years, clearly were not some type of contract of adhesion whereby the Lodge received no bargained-for-benefit. As is obvious by the instant case, the Lodge is not adverse to litigation—had it truly believed it was signing an agreement under duress, it could have sought injunctive relief. Instead, however, it would rather throw out unsubstantiated accusations in legal briefs—such statements prove nothing. In summary, then, when the Lodge filed its complaint, it was receiving electricity from Cherryland under an agreement that it negotiated. Based on this fact, MCL 124.3(2)'s plain language prohibited a municipal electric utility from providing the Lodge with electric service unless Cherryland consented "in writing" to the switch. Obviously, no such consent occurred in this case. For that reason, MCL 124.3(2) prohibited a municipal utility from delivering electric service to the Lodge. This conclusion is consistent with the Commission's decision as well as the Circuit Court's order. The Court of Appeals, therefore, should be reversed.

Perhaps recognizing its statutory language quandary, the Court of Appeals attempted to avoid MCL 124.3(2)'s plain language by reasoning that, unlike Rule 411, MCL 124.3 only affords a utility protection when there is a "customer already receiving service," instead of an "existing customer." But as just explained, the Lodge was receiving electricity from Cherryland when it filed its complaint. The Lodge executed service agreements agreeing to take electric service from Cherryland. It is difficult to imagine how the Lodge could not be "already

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Pub Sch Emp Retirement Bd, 253 Mich App 571, 576-78; 659 NW2d 629 (2002). The Lodge also attempts to make much out of a case evaluation award between Cherryland and TCL&P at the local circuit court. These statements are also nothing more than red herrings—an acceptance of a case evaluation award does not constitute a judgment on the merits. *Hoover Corners, Inc v Conklin*, 230 Mich App 567, 575; 584 NW2d 385 (1998).

receiving service" for purposes of MCL 124.3(2). Citing *Gordon Food Service*, however, the Court of Appeals concluded that, under MCL 124.3(2) "a 'complete change in use' of the parcel, along with the demolition or removal of all existing buildings and facilities and their replacement with a new structure, brings about a change of customer." *Great Wolf, supra*, at 43. This conclusion is clearly erroneous, because it relies on an inapposite and non-binding circuit court opinion and, as noted above, applies an analysis that conflicts with MCL 124.3's plain language.

The *Gordon Food Service* case dealt with facts completely different from the facts at play in this case. In *Gordon Foods Service*, there was a question as to whether the customer in question ever requested or received electric service from the utility. Whereas here, it is undisputed that Cherryland began serving the Property in 1940 at the Olesons' request. In fact, Cherryland **is still providing service to the Lodge**. That fact alone should end any analysis under MCL 124.3. Regardless, the Circuit Court in *Gordon Food Service* was wrong in its analysis, and the Court of Appeal's carry-over of this faulty analysis is improper. *Gordon Food Service* held that, under MCL 124.3, a new "customer" is created when an entity purchases property and razes all facilities receiving electric service on that property. (*Gordon Food Service,* pp 13-16, Appx. 40a-43a). The court in *Gordon Food Service* expressly noted that it would not consider the peculiar and technical meaning of the term "customer" in Rule 411 and MCL 460.10y on grounds that the Legislature could not have been aware of that meaning when it adopted MCL 124.3 because neither the rule nor the statute was in effect when MCL 124.3 was codified. *Id.* The court was plain wrong in that conclusion. MCL 124.3 was amended in 2000 subsequent to Rule 411's promulgation, and subsequent to MCL 460.10y's codification. Courts in Michigan must "presume that the Legislature was aware of all existing statutes when enacting new laws. [Courts] thus presume that the Legislature knew that statutory sections

defined" a phrase differently. *Consumers Power v Dep't Treasury*, 235 Mich App 380, 387; 597 NW2d 274 (1999) (internal citations omitted). The Legislature's 2000 amendment to MCL 124.3 did not alter the use of phrasing of "customer." In the face of the Commission's previously promulgated Rule 411 and the Legislature's previous codification of MCL 460.10y, *Gordon Food Service* should have appropriately presumed that the Legislature approved of these definitions when it chose not to alter the term "customer" under MCL 124.3 in 2000. Consequently, in addition to ignoring statutory language, relying on *Gordon Food Service* results in the Court of Appeals following an improper lower court decision.

3. Following the Court of Appeals' reasoning would defeat Rule 411's entire purpose and open the litigation floodgates.

In addition to violating statutory construction rules, the rule of *stare decisis*, and failing to grant proper deference to the Commission, adopting the Court of Appeals' reasoning in this case would create bad public policy because it would destroy Rule 411's essential purpose. Rule 411's purpose is to prevent duplication of electric facilities. (See, e.g., Case Nos. U-14193 and U-13764). Such duplication proves costly, and in some cases, dangerous. If customers may freely transfer to municipal utilities, any property where a customer switches service will have at least two sets of facilities on site. Or worse, after already losing its investment in extending services to a building or facility, a Commission-regulated utility will be forced to incur removal costs. Utilities will simply pass such costs to customers, which will in turn drive up the price of providing electric service. That simply makes no sense, especially in today's economy. Rule 411 recognizes that it is bad public policy to allow existing customers to switch from one provider to another.

Unlike the Court of Appeals' conclusion, the conclusion that Rule 411 prevents a municipal utility from poaching a customer of a Commission-regulated utility is consistent with

the utility industry's (both regulated and non-regulated utilities) reasonable expectations. Commission-regulated utilities know that they are bound by Rule 411 and protected by Rule 411(11). And municipal utilities are aware that Rule 411 binds and protects Commission-regulated utilities. Municipal utilities are also aware that MCL 124.3 prevents them from stealing customers without written consent. The Court of Appeals' decision grants to municipal utilities a broad-stroke authority to take Commission-regulated utilities' customers when the Commission-regulated utilities are bound by and (purportedly) protected by Rule 411.

The Court of Appeals' decision will also now open the floodgates for litigation, because it invites municipal utilities to encourage customers to switch service. And under the Court of Appeals' new "test" for determining whether an existing customer exists, long drawn-out fights will be necessary to determine the property owner's intent for changing uses, demolishing buildings, etc. Those issues did not exist under Rule 411's plain language or the *Consumers Energy* holding—both ignored by the Court of Appeals. The reasons for discontinuing service or demolition of buildings were of no consequence. If the Court of Appeals' recent decision stands, however, battles regarding property owner intent will ensue. And those battles will again increase costs. Stated simply, the Court of Appeals' interpretation of Rule 411 is contrary to the Rule's very purpose and contrary to wise public policy. Because the Commission's interpretation of Rule 411 is reasonable and avoids these problems, the Court of Appeals should have affirmed.

In summary, Rule 411(11)'s plain and unambiguous language entitled Cherryland to serve the entire electric load of the premises upon which the buildings and facilities it served starting in 1940 were located. The Commission was faced with the legal question of whether Rule 411 precluded the Lodge from having "full choice of electric providers." (Dkt. 01, ¶ 45,

Appx. 75a). The Commission properly interpreted Rule 411's plain language and dismissed Count II of the Complaint. The Circuit Court properly affirmed. In issuing an improper advisory opinion, the Court of Appeals ignored Rule 411's plain language and ignored precedent that it was bound to follow. Even under the Court of Appeals' newly announced tests, however, Cherryland is entitled to serve the Lodge's electric load. The presence of a municipal utility does not change this fact. Indeed, even an examination of MCL 124.3(2), the statute partially relied upon by the Court of Appeals, shows that Cherryland was entitled to serve the Lodge. Reliance on a wrongly-decided circuit court decision does not change this conclusion. As such, the Court of Appeals' decision was in error, and should be reversed. This Court should grant the deference due the Commission, and reinstate its original finding dismissing Count II.

III. THE COMMISSION PROPERLY EXERCISED ITS DISCRETION IN NOT AWARDING INTEREST AS PART OF CHERRYLAND'S REFUND TO THE LODGE.

Count I of the Lodge's complaint claimed that Cherryland was charging the Lodge an unauthorized rate. (Dkt. 01, ¶ 42, Appx. 74a). Because it had already been fined by the Commission for failing to charge the Lodge an approved rate in a prior case, *See* Case No. U-13716, *supra*, Cherryland was conscious of charging unauthorized rates. As such, Cherryland's defense to Count I was that Cherryland had begun charging the Lodge under Cherryland's Commission-approved LC&I rate because the Lodge failed to satisfy the 1500 kW/month load threshold requirement that was included in the proposed LRS tariff. Since the Lodge was not meeting the requirements of the proposed LRS tariff, Cherryland believed it risked another Commission fine for charging a rate that was not approved by the Commission if Cherryland permitted the Lodge to receive the reduced LRS rate without the Lodge meeting the proposed LRS tariff's requirements.

After "recognizing" Cherryland's justifiable concerns in this case, the Commission found that, under the "unique circumstances" presented, Cherryland should have sought clarification before charging the LC&I rate. (Dkt. 51, p 15, Appx. 653a). Because the Commission concluded that Cherryland was charging a rate not approved by the Commission, it granted the Lodge summary disposition on Count I of the Complaint and ordered a refund. *Id.* Importantly, however, the Commission did not believe that the facts "justif[ied] the imposition of...interest on the refund to [the Lodge]." *Id.*

The Circuit Court reversed the Commission's decision, citing *Detroit Edison v Mich Pub Service Comm*, 155 Mich App 461; 400 NW2d 644 (1986), for the proposition that the Commission "also has authority to assess interest on customer refunds." (COA 1 Dkt. 2, p 12, Appx. 842a). The Court of Appeals agreed, noting that interest is not a penalty, but instead is "necessary to restore Great Wolf to its original condition." *Great Wolf*, 285 Mich App at 48, citing *Detroit Edison,* 155 Mich App at 470. Both the Circuit Court and the Court of Appeals improperly disregarded the Commission's decision regarding interest.

Although both the Circuit Court and the Court of Appeals are correct that the *Detroit Edison* case stands for the proposition that the Commission has the authority to award interest on refunds, both Courts failed to recognize that the *Detroit Edison* does not *require* that the Commission award interest. In fact, it says just the opposite. Awarding interest falls within the Commission's "broad grant of authority" to regulate "rates, fares, fees, [and] charges" under MCL 460.6(1). *Detroit Edison, supra,* at 469. Since awarding interest "is at least incident to the regulation of a public utility," the Commission has the ability "to hear **and pass** on the issue." *Id.* (emphasis added). In other words, awarding interest is within the Commission's discretion. The Court of Appeals previously pointed out that an interest award is discretionary:

> [T]his Court held [in *Detroit Edison*] that the determination of the rate of interest to be paid on customer refunds falls within the broad grant of authority vested in the [Commission]. We noted that the circuit court's equitable powers are to be exercised in cases where irreparable injury is threatened, and that the setting of an interest rate is not such a case **and is better left to the expertise of [the Commission].** Applying the unlawful or unreasonable standard of review, this Court upheld the order of [the Commission]. Likewise, we hold that the [Commission] and not the circuit court has authority to order both the rate of interest to be paid and the method of compounding the interest. We will not set aside the order of the [Commission] unless it is unlawful or unreasonable.

Attorney General v Public Serv Comm; Detroit Edison Co v Public Serv Comm, 165 Mich App 230, 235-236; 418 NW2d 660 (1987). (Emphasis added.) Thus, setting an interest rate is within the Commission's expertise. Unless "cogent reasons" exist for overturning the Commission's decision, such that the Commission's decision was "unlawful or unreasonable," the Commission's decision must stand.

Neither the Lodge, the Circuit Court, nor the Court of Appeals has cited any authority requiring that the Commission award interest. In fact, the case law in this State proclaims that such decisions fall well within the Commission's expertise and discretion. Deciding not to award interest was, therefore, clearly not unlawful or unreasonable. Consequently, the Court of Appeals erred in upholding the Circuit Court's reversal of the Commission's order with respect to interest. The Commission's decision to refrain from awarding interest on the refund to the Lodge should be affirmed.

IV. THE MICHIGAN PUBLIC SERVICE COMMISSION PROPERLY EXERCISED ITS AUTHORITY TO NOT LEVY A FINE IN THIS INSTANCE, BECAUSE CHERRYLAND DID NOT "WILLFULLY OR KNOWINGLY" VIOLATE A COMMISSION ORDER.

The Commission understood that Cherryland's fears of being fined by the Commission drove its decision to charge the LC&I rate. Less than a year before the Lodge's complaint,

Cherryland had suffered a $10,000 fine for charging a rate that it thought was proper. Based on that order fining Cherryland, Cherryland believed that the "rate" in effect required a 1500 kW/month load. When Great Wolf failed to meet the 1500 kW/month load, in order to avoid another fine, Cherryland believed that it must start billing the Lodge at the already approved LC&I tariff rate. The Commission considered this defense, and believed that Cherryland was acting in good faith. In other words, it believed that Cherryland was not "willfully or knowingly" violating a Commission order. When it granted summary disposition to the Lodge on Count I of the Complaint, therefore, the Commission found that Cherryland's defense had merit, and that its arguments were not based on a "clearly unreasonable" interpretation of the Commission's July 22, 2004 Order. (Dkt. 51, p 15, Appx. 653a). As a result, the Commission concluded that Cherryland's billing of the Lodge at the LC&I rate, as opposed to the lower LRS rate, did not warrant an imposition of a fine. *Id.*

The Commission's decision rested on the Commission's fact-finding with respect to Cherryland's interpretation of the Commission's July 22, 2004 Order and the Commission's interpretation and application of the Commission's own rules. Although the Lodge lacked standing to appeal such a decision, it did so and the Circuit Court reversed the Commission's decision not to fine Cherryland. The Court of Appeals then affirmed the reversal of the Commission based on an erroneous interpretation of MCL 460.558.

A. The issue of fines is not properly before the Court, because the Lodge lacks standing to assert that the Commission should have levied a fine.

At its core, standing addresses subject matter jurisdiction, which involves the power of a court to hear and determine a cause or matter. *Detroit Firefighters Assoc v Detroit*, 449 Mich 629, 633, n 3; 537 NW2d 436 (1995) *reh'g denied*, 450 Mich 1215; 543 NW2d 309 (1995) (noting that "[s]tanding is a jurisdictional issue"). Consequently, standing issues may be raised

at any time by the parties, or *sua sponte* by the court. *Nat'l Wildlife Federation v Cleveland Cliffs Iron Co*, 471 Mich 608, 630; 684 NW2d 800 (2004) ("Subject-matter jurisdiction is a matter that may be raised at any time.") A party may raise the issue of standing, therefore, for the first time on appeal. *See Bender v Williamsport Area Sch Dist*, 475 US 534, 546-47; 106 S Ct 1326 (1986).

Although Michigan courts are not "Article III Courts," the standing doctrine in Michigan has developed on a similar track as the federal standing doctrine. *Lee v Macomb Co Bd of Commr's*, 464 Mich 726, 737; 629 NW2d 900 (2001). In fact, this Court in 2001 adopted the same test that is used by federal courts for determining whether a plaintiff has standing. *Id.* at 739. The standing test under Michigan law presents three questions:

> At a minimum, standing consists of three elements: 'First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not 'conjectural or hypothetical.' Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be 'fairly...traceable to the challenged action of the defendant, and not...the result [of] the independent action of some third party not before the court.' Third, it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision."

Cleveland Cliffs, supra at 628-29 (citations omitted). In addition, to have "appellate standing," "the party filing the appeal must be aggrieved by a lower body's decision." *Rymal v Baergen*, 262 Mich App 274, 318; 686 NW2d 241 (2004), quoting *Dep't of Consumer & Industry Services v Shah*, 236 Mich App 381, 385; 600 NW2d 406 (1999). In order to be an "aggrieved party" on appeal, a litigant "must demonstrate an injury arising from either the actions of the trial court or the appellate court judgment, rather than an injury arising from the underlying facts of the case." *Federated Ins Co v Oakland Co Rd Comm*, 475 Mich 286, 291; 715 NW2d 846 (2006).

This standing test is not a new development in Michigan law. Rather, it represents a re-affirmation of the Michigan Constitution's allocation of authority between the three branches of government. *See Lee, supra* at 735-39; *Cleveland Cliffs, supra* at 613. At bottom, it reflects a core understanding that "there is no liberty...if the power of judging be not separated from the legislative and executive powers." *Cleveland Cliffs, supra* at 613, quoting Madison, *the Federalist No 47.* An application of Michigan's standing test reveals that the Lodge lacks standing to appeal the Commission's decision not to levy a fine against Cherryland.

The Lodge simply has no concrete and particularized injury in the Commission's decision not to levy a fine. The fine, if levied and collected, would have gone to the State of Michigan's coffers. *See* MCL 460.558. Furthermore, even if the Lodge could claim some injury, the Lodge cannot demonstrate that its injury would be redressed by a reversal of the Commission's decision. It is unclear how fining Cherryland would redress any claimed injury to the Lodge. It already received its refund—it was not injured in any way by the Commission's decision not to fine Cherryland. It is impossible, therefore, for the Lodge to demonstrate that it is aggrieved by the Commission's decision. As a result, the Lodge lacks standing to appeal the Commission's decision regarding fines. Because the Lodge lacks standing, the Circuit Court and the Court of Appeals lacked subject matter jurisdiction to hear the Lodge's appeal. This Court also lacks subject matter jurisdiction. The Commission's Order, therefore, must be affirmed.

B. The Commission properly exercised its authority in determining not to issue a fine. MCL 460.558 only requires fines if a utility willfully or knowingly fails or neglects to comply with a Commission order, and the Commission determined that Cherryland did not willfully or knowingly fail to comply with an order.

Courts "ordinarily will uphold the [Commission's] interpretations [of its own orders] as long as they are supported by the record or otherwise reasonable." *Ameritech Mich* 240 Mich App 292. In addition, the Commission's interpretation of a statue or rule that the Commission is

charted with interpreting and administering is "entitled to respectful consideration and ought not to be overruled without cogent reasons." *In re Rovas*, 482 Mich at 108.

MCL 460.558, the statute under the Commission's purview and which was interpreted by the Commission when it decided to not levy fines against Cherryland, provides that a utility shall forfeit a fine to the state of Michigan if the utility "willfully or knowingly fails or neglects to obey or comply" with a Commission order. The Court of Appeals interpreted this statutory language to mean that a fine was mandatory "in the event of negligent noncompliance." *Great Wolf, supra* at 608. This conclusion fails to grant the Commission the proper deference in interpreting its own orders, and ignores the statute's plain language.

By its own terms, MCL 460.558 only requires a fine if Cherryland willfully or knowingly failed or neglected to obey a Commission order. The order in question in this instance was the Commission's July 22, 2004 Order in Case No. U-13716—the specific question being whether that order referred to the LRS rate only, or whether it included any minimum load requirements that were included in Cherryland and the Lodge's agreements. Based on the facts presented to the Commission, it concluded that Cherryland's "interpretation of the July 22 order was not so clearly unreasonable as to justify the imposition of a fine or interest on the refund to [the Lodge]." (Dkt. 51, p 15, Appx. 653a). The Commission recognized Cherryland's concerns about charging an unauthorized rate, and concluded that Cherryland's actions did not amount to a willful or knowing failure to comply with a Commission order. The Commission's fact finding and interpretation of its own order should not be disturbed.

Even if the lower courts were able to disregard the Commission's finding that Cherryland's interpretation of a prior Commission order did not constitute a willful or knowing violation of a Commission order, the lower courts' analysis still ignored MCL 460.558's plain

language. Taking away the Commission's sound judgment regarding Cherryland's motives and actions, nothing in the record supports a conclusion that Cherryland willfully violated a Commission order. As the Supreme Court has noted:

> Willful is defined as deliberate, voluntary, or intentional. Willful implies opposition to those whose wishes, suggestions, or commands ought to be respected or obeyed: a willful son who ignored his parent's advice. Willful means action taken knowledgeably by one subject to the statutory provisions in disregard of the action's legality.

Brackett v Focus Hope, Inc, 482 Mich 269, 277 (2008), citing *Random House Webster's College Dictionary*, (1991). There has been no evidence presented, nor any finding by the Commission, that Cherryland's conduct was carried out in disregard of the legality of a Commission order. In fact, just the opposite is true—Cherryland's actions were taken because of previously being fined by the Commission. The Commission understood this, and in exercising its discretion while interpreting both its own prior orders and MCL 460.558, found that no fine was warranted. Both the Circuit Court and the Court of Appeals were in error to reverse the Commission. The Court of Appeals should, therefore, be reversed, and the Commission's decision reinstated.

CONCLUSION AND RELIEF REQUESTED

There are both financial and public safety reasons for preventing the unnecessary duplication of electric facilities. Recognizing this, the State of Michigan has long held to the policy of restricting such duplication. The Lodge wants to destroy this policy. The Commission, validly interpreting and applying Rule 411's plain language, correctly found that Cherryland was entitled to serve the Lodge's entire electric load. Cherryland had been serving buildings and facilities located on the Lodge's property for decades—it never gave up its right to serve. To conclude that Cherryland is not entitled to serve, the Court of Appeals ignored Rule 411's plain language and Court of Appeal's published and binding precedent. By judicial decree, the Court

of Appeals reversed years of straightforward and logical policy. It misinterpreted MCL 124.3, and relied on an incorrectly decided circuit court case. For all the foregoing reasons, Cherryland respectfully requests that the Court reverse the Court of Appeals and reinstate the Commission's decision with respect to Cherryland's entitlement to serve, and reverse the Court of Appeals' and Circuit Court's reversal of the Commission's decision that Cherryland should not be fined or pay interest on its refund to the Lodge.

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